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No. 08-543

Supreme Court, U.S.
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In The
Supreme Court of the United States

LAWRENCE R. POLINER, M.D.,
LAWRENCE R. POLINER, M.D., P.A.,

Petitioners,

v.

TEXAS HEALTH SYSTEM, DOING BUSINESS AS PRESBYTERIAN HOSPITAL OF DALLAS, TEXAS, A TEXAS NON-PROFIT CORPORATION, JAMES KNOCHEL, M.D.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS

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December 12, 2008

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QUESTION PRESENTED

Whether the court of appeals correctly applied the objective "reasonable belief" standard in the immunity provisions of the Health Care Quality Improvement Act, 42 U.S.C. §§ 11112(a)(1) and (4), by following the settled, uniform caselaw from other circuits.

LIST OF PARTIES AND CORPORATE DISCLOSURE STATEMENT

Petitioners Lawrence R. Poliner, M.D. ("Poliner") and Lawrence R. Poliner, M.D., P.A. (the "Professional Association") (collectively "Petitioners") were plaintiffs in the trial court. This Court has no jurisdiction over claims by the Professional Association as it won no relief in the Amended Final Judgment, never filed a notice of appeal from the Amended Final Judgment, and dismissed its cross-appeal from the original Final Judgment. *See* Jurisdiction, *infra* at 1.

Respondents Texas Health Resources (sued here as Texas Health System, doing business as Presbyterian Hospital of Dallas, a Texas non-profit corporation) ("PHD") and James Knochel, M.D. ("Knochel") (collectively "Respondents") were defendants in the trial court and appellants in the Court of Appeals. Charles Harris, M.D., Anthony Das, M.D., Charles Levin, M.D., David Musselman, M.D., John Harper, M.D., Robert Brockie, M.D., Jorge Cheirif, M.D., Steven Meyer, M.D., and Martin Berk, M.D. were additional defendants in the trial court.

In the Fifth Circuit, the following entities appeared as *amici curiae* supporting Respondents: Health Care Indemnity Corporation, American Hospital Association, Texas Hospital Association, Children's Medical Center of Dallas, The Methodist Hospital, Mississippi Hospital Association, North Mississippi

LIST OF PARTIES – Continued

Health Services, Inc., Our Lady of the Lake Hospital, Inc., Rush Health Services, Summa Health System, Tenet Healthcare Corporation, and Texas Children's Hospital.

The Association of American Physicians and Surgeons, Inc. ("AAPS"), appeared in the Fifth Circuit as *amicus curiae* supporting Petitioners, as it has, too, in this Court. The Semmelweis Society International, Inc. ("SSI") has also appeared in this Court as *amicus curiae* supporting Petitioners.[1]

Pursuant to Supreme Court Rule 29.6, Respondents make the following disclosures:

Texas Health Resources (sued here as Texas Health System, doing business as Presbyterian Hospital of Dallas, a Texas non-profit corporation) is a Texas non-profit corporation. Presbyterian Hospital of Dallas is also a Texas non-profit corporation. As non-profits, neither has a parent company, and neither has issued any stock.

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[1] However, Petitioners did not consent to the filing of SSI's brief, and SSI's Motion for Leave to File is still pending.

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OPINIONS BELOW

Petitioners attached the wrong judgment to their petition. Pet. App. at 62a-65a. Petitioners attached the original Final Judgment entered on October 13, 2006. Subsequently, the trial court granted in part Respondents' Motion to Alter or Amend Final Judgment and entered an Amended Final Judgment on November 20, 2006. The Amended Final Judgment is attached as Appendix A, Opp. App. at 1-3, and the court's Memorandum Opinion and Order granting in part Respondents' Motion to Alter or Amend Final Judgment is attached as Appendix B. Opp. App. at 4-12; *see infra* at 11-14 for the chronology of the district court's several pre-trial and post-trial opinions.[2]

JURISDICTION

The Court does not have jurisdiction over any claims by Lawrence R. Poliner, M.D., P.A. (the "Professional Association"). The Professional Association obtained no relief in the Amended Final Judgment, never filed a notice of appeal from the Amended Final Judgment, and dismissed its cross-appeal from the original Final Judgment. The Professional Association has therefore abandoned its claims.

[2] Additionally, the Westlaw opinion cited by Petitioners (Pet. at 1), 2003 WL 22255677 (N.D. Tex. Sept. 30, 2003), is the district court's summary judgment opinion, not a post-verdict opinion.

STATUTES INVOLVED[3]

(c) Adequate procedures in investigations or health emergencies.

For purposes of Section 11111(a) of this title, nothing in this section shall be construed as –

(1) requiring the procedures referred to in subsection (a)(3) of this section –

* * *

(B) in the case of a suspension or restriction of clinical privileges, for a period of not longer than 14 days, during which an investigation is being conducted to determine the need for a professional review action; or

(2) precluding an immediate suspension or restriction of clinical privileges, subject to subsequent notice and hearing or other adequate procedures, where the failure to take such an action may result in an imminent danger to the health of any individual.

INTRODUCTION

Petitioners seek this Court's review of a unanimous panel decision of the Fifth Circuit, authored by Judge Higginbotham, that properly applied the well-established standards for immunity under the

[3] Petitioners omitted these portions of HCQIA on which the Fifth Circuit relied.

Health Care Quality Improvement Act ("HCQIA") to restrictions on Poliner's medical staff privileges that lasted less than one month. *See* 42 U.S.C. § 11112(a).[4] Petitioners single out the "reasonable belief" standard contained in 42 U.S.C. Sections 11112(a)(1) and (4) and contend that the Fifth Circuit and every other Circuit Court that has addressed the issue has wrongly held that "reasonable belief" is judged by an objective standard and that evidence of alleged bias or improper motive is irrelevant to the determination of objective reasonableness. As the Fifth Circuit summarized, "We agree with our sister circuits that the HCQIA's 'reasonableness requirements were intended to create an objective standard of performance, rather than a subjective good faith standard.'" Pet. App. at 18a (footnote omitted – *quoting Bryan v. James E. Holmes Reg'l Med. Ctr.*, 33 F.3d 1318, 1323 (11th Cir. 1994), and collecting cases). Petitioners repeatedly admit that there is no conflict on this issue in the Courts of Appeals and that the Fifth Circuit followed settled law in reversing and rendering judgment for Respondents. *See, e.g.*, Pet. at 8, 9, 10, 11-12, 20,[5] 25, 30, 33.[6]

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[4] Former Chief Judge King and Judge Southwick joined in the opinion.

[5] "One by one, circuit courts of appeals have parroted this erroneous standard. . . . Thus, each and every case in which the 'reasonable belief' prongs of immunity have been analyzed by a circuit court of appeals has been dismissed as a matter of law based on federal immunity." Pet. at 20.

[6] Amicus SSI disagrees with Petitioners on this issue and unconvincingly tries to manufacture a circuit conflict with

(Continued on following page)

Petitioners' real complaint is with the policy decision Congress made in passing the qualified immunity provisions of HCQIA to protect doctors and hospitals that engage in peer review from chilling, inflated damages claims by the physicians whose conduct is reviewed. *See* Pet. App. at 16a-17a, 36a. Congress made clear in the plain language of the statute and in the legislative history that courts should use an objective test,[7] and that is what the courts have uniformly done. Petitioners offer no indication that Congress has ever disapproved of this uniform construction. Petitioners should lodge their complaint with Congress, not with this Court. Certiorari should be denied.

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confusing, inconsequential snippets of case quotations relating to various issues under HCQIA and various state peer review statutes. SSI Br. at 9-15. There is no conflict in the Circuit Courts about the use of an objective standard to determine the existence of a "reasonable belief" under HCQIA. *See infra* at 16-22.

[7] "The Committee intends that this [reasonable belief] test will be satisfied if the reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their action would restrict incompetent behavior or would protect patients." H.R. Rep. No. 903, at 10, (1986), *as reprinted in* 1986 U.S.C.C.A.N. 6392-93; *see* Pet. App. at 21a-22a.

STATEMENT OF THE CASE

While Petitioners label the facts "quite complex," Pet. at 5, they do not discuss them.[8] Even a brief overview demonstrates that the Fifth Circuit correctly held that Respondents' temporary restriction of Poliner's cardiac catheterization privileges was immune under HCQIA as a matter of law. *See* Pet. App. at 3a-12a.

By May 1998, a series of complaints had raised concerns about cardiologist Poliner's medical judgment and technical skill and the quality of his patient care. The PHD Clinical Risk Review Committee had requested that Knochel, a kidney specialist and the chairman of the Internal Medicine Department, investigate the following complaints in consultation with the Internal Medicine Advisory Committee ("IMAC"):

> Fall 1996: Patient 10, who had known allergies to iodine (or Betadine) and had refused pretreatment with Benadryl, suffered a post-procedure, allergic reaction, ostensibly to the iodine-containing contrast dye injected into her arteries. *Id.* at 6a n.7. The IMAC initially found concerns about Poliner's care,

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[8] The approach of amicus AAPS toward the facts is cavalier, and its tone disturbing. *See, e.g.*, AAPS Br. at 7-8 (complaints about Poliner's performance were "frivolous," "contrived," and "medically insignificant"), 5 ("a charade"), 20 (comparing patients to shoppers), 11 (Fifth Circuit "rubber stamp[ed] the corrupt prior review").

including lack of documentation for the patient's need for the procedure and lack of knowledge about which contrast dye he had used, but cleared the case after it received Poliner's response and after Poliner was counseled on documentation and contrast dye issues. *Id.* at 6a-7a.

September 1997: Patient 18, an 88-year-old woman, became hypotensive and died in the cardiac catheterization lab when Poliner attempted an arguably unnecessary 2:00 a.m. angioplasty. *Id.* at 6a n.8. The cardiologist who reviewed Poliner's performance on this case, at Knochel's request, criticized Poliner's judgment and skill, finding, among other things, that Poliner failed timely to acquire access to the patient's artery, to appreciate the significance of obvious bleeding, and to consider all possibilities in treating the patient's hypotension.

October 1997: Patient 9 suffered a hemorrhagic stroke from bleeding in the brain following a procedure that Poliner performed; Poliner chose not to come to the hospital to examine the patient even though a nurse advised him of significant changes in the patient's condition, and Poliner did not order a neurological consult or a CT scan until he arrived at the hospital hours later. *Id.* at 6a n.6. Dr. Levin, who reviewed this case at Knochel's request, criticized, among other things, Poliner's failure to adequately and timely assess the patient despite serious changes in the patient's condition.

> December 1997: Patient 3, a 75-year-old man admitted for diagnostic cardiac catheterization, was exposed to potential infection because Poliner reused the original sheath site for a second procedure. Poliner left the original sheath in for two days, twice as long as is standard procedure, then exchanged it for a new sheath before performing angioplasty using the same site despite staff concerns about infection and contamination by blood and urine. *Id.* at 6a n.5. The physician who reviewed this complaint also criticized Poliner's judgment and deviation from standard procedure.
>
> January 1998: Patient 39 suffered complications when Poliner failed to recognize that he had mistakenly inserted the catheter into a vein instead of an artery until he had threaded the catheter all the way to the patient's heart. *Id.* at 7a n.9.

On May 12, 1998, the complaints concerning Patient 18 (death), Patient 9 (post-procedure stroke), and Patient 3 (contaminated sheath site) still remained under review by the IMAC and Dr. Knochel. *Id.* at 7a. On that day, Poliner committed the serious, life-threatening, and admitted mistakes on Patient 36 that led to the temporary restrictions on Poliner's medical staff privileges that became the subject of his damage claims below. *Id.* at 3a-5a, 7a-8a.

Patient 36, a 43-year-old man, was admitted with chest pain. Poliner admitted in writing that he misread the electrocardiogram and diagnostic film and

failed to see that the patient's left anterior descending artery was completely blocked. Poliner operated on the patient's right coronary artery instead, caused multiple tears that required repair with five stents, and possibly caused a heart attack. As a result of the stents required to patch the tears Poliner made during the procedure, Patient 36 was administered an anti-coagulant. He suffered serious internal bleeding. After Poliner failed to answer multiple pages from nursing staff regarding his deteriorating patient, a critical-care specialist was called in. Patient 36 had to be intubated, put on a respirator, and given supportive drug therapy. *See id.* at 3a-5a. But for the critical care specialist, Patient 36 would have died within an hour from blood loss.[9]

The life-threatening emergency that Poliner created with Patient 36, plus the other pending complaints and the negative trends in Poliner's performance, led Knochel to conclude that Poliner's privileges should be temporarily restricted pending a further investigation. *Id.* at 7a-8a. On May 13, 1998, after consulting with appropriate colleagues, Knochel

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[9] AAPS's suggestion that all of these patient cases were somehow selected in bad faith and that the jury so found has no support in the record. AAPS Br. at 3, 7-8; *see* Pet. App. at 3a-7a. AAPS's further complaint that these cases were "*not* representative" of Dr. Poliner's performance is meaningless under HCQIA and is belied by the record. AAPS Br. at 8 (original emphasis); *see* Pet. App. at 21a, 8a-9a (Poliner does not challenge the ad hoc committee finding that he administered substandard care in more than half of the cases studied).

requested, under the PHD Medical Staff Bylaws, that Poliner agree to place his cardiac catheterization privileges in temporary abeyance for up to 15 days so that his performance could be reviewed and evaluated. *Id.* at 7a.[10] When Poliner asked what his options were, Knochel stated that the "alternative was suspension of his privileges." *Id.* at 8a. On May 14, Poliner signed the first abeyance agreement and hired a lawyer. *Id.*

Knochel then appointed an ad hoc committee of six cardiologists to review Poliner's performance. The ad hoc committee reviewed 44 of Poliner's cases and "concluded that Poliner gave substandard care in more than half." *Id.* at 9a.[11] The IMAC met on May 27, 1998 to consider the ad hoc committee's report and recommended that the temporary restrictions on Poliner's privileges be extended so that additional reviews of some of Poliner's echocardiograms could be conducted. *Id.* On May 29, Poliner, who was represented by counsel, signed the second abeyance agreement, extending the restrictions for an additional 14 days. *Id.*

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[10] AAPS's statement that "Respondents themselves had no genuine concern about these cases" is false. AAPS Br. at 3; *see* Pet. App. at 6a-10a, 22a-23a. At trial, even Petitioners' own cardiology experts uniformly testified that Poliner's performance raised patient safety concerns and warranted review.

[11] AAPS is silent about these cases and the ad hoc committee's findings.

On June 11, Poliner met with the IMAC, and on June 12, the IMAC unanimously recommended that Poliner's cardiac catheterization and echocardiography privileges be suspended given the following, specific concerns: "(1) poor clinical judgment; (2) inadequate skills, including angiocardiography and echocardiography; (3) unsatisfactory documentation of medical records; and (4) substandard patient care." *Id.* at 10a. Knochel accepted the IMAC's recommendation and suspended Poliner's cardiac catheterization and echocardiography privileges. *Id.*[12]

Poliner requested that a PHD Hearing Committee review the suspension. In November 1998, the Hearing Committee found "that the June 12 suspension should be upheld based on the evidence that was available at the time" but recommended that Poliner's privileges be reinstated with monitoring. *Id.* at 11a.[13]

In May 2000, Poliner sued PHD, Knochel, and nine cardiologists who participated in Poliner's peer review, alleging violations of federal and state antitrust laws and the Texas Deceptive Trade Practices Act, defamation, breach of contract, tortious interference, and intentional infliction of emotional distress. *Id.* at 12a. Poliner later added his Professional

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[12] Petitioners do not challenge the June 12 suspension of Poliner's privileges. *See* Pet. App. at 21a.

[13] AAPS's statement that PHD "absolved" Poliner "of anything improper" is also false. AAPS Br. at 3; *see* Pet. App. at 11a.

Association as a plaintiff. After discovery, the court (the Honorable Jorge Solis) granted in part the motion for summary judgment filed by all defendants. *Id.* at 71a-115a. The court dismissed Poliner's antitrust and Deceptive Trade Practices Act claims. *Id.* at 86a-92a, 114a. The court further held that all defendants were immune under HCQIA and the Texas peer review statute[14] for all claims concerning the June 1998 suspension. *Id.* at 94a-110a.[15] However, the court denied the motion for summary judgment of Respondents and Doctors Levin and Harper on Poliner's claims relating to the abeyances – the temporary restrictions preceding the June 1998 suspension. *Id.* at 94a-110a.[16]

At trial, the jury found that Poliner had not agreed to the abeyances and found against Respondents, Harper, and Levin on the peer review immunity issues and for Petitioners on all claims (defamation, contract, tortious interference, business disparagement, and intentional infliction of emotional distress). The jury assessed damages exceeding $366,000,000,

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[14] TEX. OCC. CODE § 160.010.

[15] In a subsequent pre-trial order, the court clarified that Petitioners could not recover damages for the immune June 1998 suspension. Pet. App. at 66a-70a.

[16] The Fifth Circuit detailed the dramatic shift in Petitioners' theory of the case in light of the partial summary judgment order and Petitioners' consequent, improper focus on the standards under the PHD Medical Staff Bylaws rather than on the standards under HCQIA. Pet. App. at 13a-15a.

including $110,000,000 in punitive damages. *Id.* at 116a-162a.

Petitioners moved for judgment against Respondents, requesting $70,000,000 in defamation damages, $10,526.55 in breach of contract damages, $1,900,000 in attorneys' fees, and $90,000,000 in punitive damages.[17] Respondents filed a renewed motion for judgment as a matter of law and motions for new trial and remittitur.

In a series of opinions and orders on March 27, 2006, September 18, 2006, October 6, 2006, and October 13, 2006, the court denied Respondents' renewed motion for judgment as a matter of law and motion for new trial, but granted Respondents' motion for remittitur. *See Poliner v. Texas Health Sys.*, No. Civ. A. 3:00-CV-1007-P, 2006 WL 770425, at *1 (N.D. Tex. Mar. 27, 2006); Pet. App. at 38a-61a (Oct. 13, 2006). The court held that it would enter judgment on Poliner's defamation claim in order to maximize Poliner's recovery.[18] The court further held that

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[17] Harper and Levin settled with Petitioners after verdict.

[18] Poliner advanced a novel defamation claim – that the two abeyance decisions constituted defamatory "statements" that somehow branded Poliner a "dangerous" doctor. *See* Pet. App. at 13a-15a. This argument tried not only to turn defamation law on its head but also to eviscerate the immunity HCQIA provides to doctors and hospitals that make objectively reasonable decisions to temporarily suspend a physician's privileges during a peer review investigation. *See* 42 U.S.C. §§ 11112(a) and (c)(1)(B). Poliner further argued, without any better basis, that the alleged false, defamatory statements also included unattributed

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the jury's awards, totaling $70,000,000 in non-economic damages and $90,000,000 in punitive damages, were excessive, irrational, and unsupported, but declined to find that the awards were the product of passion and prejudice. Although Poliner proved no economic damages,[19] the court set Poliner's non-economic defamation damages at $21,000,000. The court also remitted punitive damages against each Respondent to the maximum amount under the applicable Texas statute, TEX. CIV. PRAC. & REM. CODE § 41.008. *See* Pet. App. at 38a-61a.

After Petitioners accepted the remittitur, the court *sua sponte* added $7,894.92 in economic damages and entered the original Final Judgment on October 13, 2006. *Id.* at 62a-65a.

Respondents again renewed their post-verdict motions and also moved to alter or amend the judgment. The court denied Respondents' renewed motions, but granted in part their Motion to Alter or Amend by deleting both the defamation award to the Professional Association (because the Professional Association never submitted a defamation claim to the jury) and the award of economic damages

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rumors about the abeyances, the internal memorandum by which Knochel appointed the ad hoc committee, and Knochel's truthful response to an inquiry about Poliner's privileges from the Kansas Physician Information Verification Program. *See* Pet. at 3-4 and n.4; Pet. App. at 225a-230a.

[19] In fact, the Professional Association took in more than $1,200,000 in 2000.

(because Poliner proved no economic damages). Opp. App. at 10-12.

The Amended Final Judgment awarded Poliner $22,500,000 in non-economic and punitive damages for defamation: $12,750,000 against Knochel ($6,000,000 for injury to career/reputation; $6,000,000 for mental anguish; and $750,000 for punitive damages) and an additional $9,750,000 against PHD ($4,500,000 for injury to career/reputation; $4,500,000 for mental anguish; and $750,000 for punitive damages). *Id.* at 2.[20]

Consequently, for alleged false statements relating solely to temporary restrictions on Poliner's cardiac catheterization privileges which lasted less than one month, Poliner recovered $10,500,000 for injury to career/reputation, $10,500,000 for mental anguish, and $1,500,000 in punitive damages. The court's prejudgment interest award, entered over repeated objections, added over $11,000,000 to the Amended Judgment. Pet. App. at 15a.

Respondents timely filed joint notices of appeal to the Fifth Circuit, and Petitioners filed a notice of cross-appeal from the original Judgment (but not from the Amended Final Judgment). Petitioners then voluntarily dismissed their cross-appeal.[21]

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[20] The Amended Judgment did not award any relief to the Professional Association. Opp. App. at 1-3; *see supra* at 1.

[21] Petitioners thus dropped any challenge to the trial court's summary judgment holding that, as a matter of law, Respondents were immune under HCQIA and the Texas medical peer

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The unanimous Fifth Circuit panel issued its decision on July 23, 2008, reversing the Amended Final Judgment and rendering judgment in favor of Respondents. Pet. App. at 1a-37a. The court decided the case solely on the basis of HCQIA immunity, holding that each of the two abeyance decisions, which temporarily restricted Poliner's cardiac catheterization privileges, constituted a professional review action that was immune from damage claims under HCQIA as a matter of law. *Id.* at 3a, 16a-37a. The court further wrote: "Because Defendants are immune under the HCQIA, we have no occasion to consider Defendants' other substantial arguments that we must reverse and render judgment based on state law immunity and because Poliner failed to prove the substantive elements of his claims. . . . Nor need we reach the compelling arguments that, at the very least, we would have to reverse and remand for a new trial because of the jury's excessive verdict and manifest trial errors." *Id.* at 37a.

No motion for rehearing or rehearing en banc was filed. On October 7, Poliner filed a *pro se* application to extend time to file a petition for certiorari. Justice Scalia denied the application on October 16. Only five days later, on October 21, Petitioners' longtime counsel filed the Petition for Writ of Certiorari.[22]

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review statute for the five-month suspension of Poliner's privileges beginning on June 12, 1998. Pet. App. at 21a.

[22] Poliner previously indicated that he would try to raise money from medical associations and other organizations to

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AAPS has filed an amicus brief supporting Petitioners, and SSI's Moton for Leave to File is pending.[23]

REASONS FOR DENYING THE PETITION

I. AS PETITIONERS ADMIT, THERE IS NO CONFLICT AMONG THE COURTS OF APPEALS OVER THE OBJECTIVE REASONABLENESS STANDARD UNDER HCQIA.

Throughout their petition, Petitioners admit that there is no conflict in the Circuit Courts of Appeals and that the Fifth Circuit followed well-established law in applying an objective standard under Sections 11112(a)(1) and (4). *See, e.g.*, Pet. at 8, 9, 10, 11-12, 20, 25, 30, 33. The Fifth Circuit, expressly following its sister circuits, wrote: "We agree with our sister circuits that the HCQIA's 'reasonableness requirements were intended to create an objective standard of performance, rather than a subjective good faith standard.'" Pet. App. at 18a and at n.26 (quoting *Bryan*, 33 F.3d at 1323, and *citing Singh v. Blue Cross/Blue Shield of Mass., Inc.*, 308 F.3d 25, 32 (1st Cir. 2002); *Sugarbaker v. SSM Health Care*, 190 F.3d 905, 912 (8th Cir. 1999); *Brown v. Presbyterian*

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finance his personal lawsuit, but he has not disclosed any contributions. *See* Petitioners' Application to Extend Time to File Petition for a Writ of Certiorari at Appendix A.

[23] Petitioners did not consent to the filing of SSI's brief.

Healthcare Servs., 101 F.3d 1324, 1333 (10th Cir. 1996); *Mathews v. Lancaster Gen. Hosp.*, 87 F.3d 624, 635 (3d Cir. 1996); *Smith v. Ricks*, 31 F.3d 1478, 1485 (9th Cir. 1994); and *Doe v. La. Psychiatric Med. Ass'n*, No. 96-30232, 1996 WL 670414, at *3 (5th Cir. Oct. 28, 1996)).[24]

In assessing whether Petitioners had rebutted the presumption of immunity under Section 11112(a)(1), the Fifth Circuit again expressly followed the settled law:

> We begin with whether each peer review action was taken "in the reasonable belief that the action was in the furtherance of quality health care." It is plain that they were by the controlling standards. Other circuits have explained, as relevant under the facts of this case, that "[t]he 'reasonable belief' standard of the HCQIA is satisfied if the 'reviewers, with the information available to them at the time of the professional review action, would reasonably have concluded that their action would restrict incompetent behavior or would protect patients.'" "[T]he Act does not require that the professional review result in an actual improvement of the quality of health care," nor does it require that the conclusions reached by the reviewers were in fact correct. It bears emphasizing that "the good or bad faith of the reviewers is

[24] This Court denied certiorari in the *Bryan*, *Sugarbaker*, *Brown*, *Mathews*, and *Smith* cases.

> irrelevant"; rather it is an objective inquiry in which we consider the totality of the circumstances.

Pet. App. at 21a-22a (footnotes omitted).

Rejecting Poliner's flimsy arguments about Respondents' alleged subjective motives, the Fifth Circuit continued to follow the well-worn path of other circuits:

> Poliner's urging of purported bad motives or evil intent or that some hospital officials did not like him provides no succor. We have serious doubts that Poliner proved that the restrictions resulted from anti-competitive motives, and more to the point, the inquiry is, as we have explained, an objective one. Our sister circuits have roundly rejected the argument that such subjective motivations overcome HCQIA immunity, as do we.

Id. at 25a (footnote omitted).

Finally, in construing the "reasonable belief" standard in Section 11112(a)(4), the Fifth Circuit wrote:

> [W]e consider whether each peer review action was taken "in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts." "Our analysis under § 11112(a)(4) closely tracks our analysis under § 11112(a)(1)." In both instances, the temporary restrictions were "tailored to address the health care concerns" that had been raised – procedures

> in the cath lab – leaving untouched Poliner's other privileges. Nor was the information relayed to Knochel "so obviously mistaken or inadequate as to make reliance on [it] unreasonable." There was an objectively reasonable basis for concluding that temporarily restricting Poliner's privileges during the course of the investigation was warranted by the facts then known, and for essentially the reasons given above, we hold that Defendants satisfy this prong.

Id. at 35a-36a (footnotes omitted).

Faced with uniform precedent and the Fifth Circuit's unerring application of that precedent, Petitioners argue that the Fifth Circuit (and all other circuits) have incorrectly interpreted HCQIA's "reasonable belief" standard as an objective standard. Pet. 8. Petitioners reiterate and re-frame this single argument over the 34 pages of their Petition, asking this Court to overturn the Fifth Circuit's decision in this case, as well as to overrule all cases in other circuits that have interpreted HCQIA's "reasonable belief" standard.

In support, Petitioners mix federal and state peer review standards, cite *Black's Law Dictionary*, and weakly offer a confused hodgepodge of legislative history[25] and three quasi-policy arguments about alleged adverse "effects" of the application of the

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[25] AAPS does not believe that examination of legislative intent is necessary. AAPS Br. at 7, 12.

objective "reasonable belief" standard. Pet. at 12-32. None of Petitioners' arguments compels a departure from the uniform caselaw applying the plain language of the statute and clear Congressional intent.

On the legislative history, Petitioners suggest that Congress intended evidence of subjective intent (or perhaps just evidence of anticompetitive motive) to trump a determination of "reasonable belief" under HCQIA.[26] That suggestion, however, entirely disregards the Courts of Appeals' uniform analysis of that same legislative history and uniform conclusion that "HCQIA's 'reasonableness requirements were intended to create an objective standard of performance, rather than a subjective good faith standard.'" Pet. App. at 18a (footnote omitted – *quoting Bryan*, 33 F.3d at 1323).[27] Pointing to the same Committee report cited by many courts for the conclusion that Congress rejected a subjective standard and adopted instead an objective standard, Petitioners argue that,

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[26] Petitioners' focus on anticompetitive motive is particularly puzzling since Petitioners' antitrust claims were dismissed on summary judgment, and Petitioners have not challenged that dismissal.

[27] *Singh*, 308 F.3d at 32, 38-39; *Brader v. Allegheny Gen. Hosp.*, 167 F.3d 832, 840-41, 843 (3d Cir. 1999); *Mathews*, 87 F.3d at 634-36, 638; *Freilich v. Upper Chesapeake Health, Inc.*, 313 F.3d 205, 212-13 (4th Cir. 2002); *Imperial v. Suburban Hosp. Ass'n, Inc.*, 37 F.3d 1026, 1030 (4th Cir. 1994); *Meyers v. Columbia/HCA Healthcare Corp.*, 341 F.3d 461, 468-69, 471 (6th Cir. 2003); *Sugarbaker*, 190 F.3d at 912-14, 916-17; *Smith*, 31 F.3d at 1485; *Austin v. McNamara*, 979 F.2d 728, 734-35 (9th Cir. 1992); *Brown*, 101 F.3d at 1333; *Bryan*, 33 F.3d at 1323.

although Congress clearly favored an objective "reasonable belief" test, it did not preclude consideration of evidence of bias or improper motive. Pet. at 17-20.[28] Petitioners never deal with the irreconcilable difference between an objective standard and a subjective standard and never even hint how a court would begin to apply Petitioners' proposed hybrid standard that somehow combines objective reasonableness with subjective motivation. Petitioners' proposal is contrary to the statute and the legislative history, illogical, and, indeed, unworkable.

In further support of their legislative history argument, Petitioners cite (1) the title of Public Law 99-660, which includes the words "good faith" and (2) a statement related to the notice and hearing requirements for non-emergency professional review actions. Pet. at 18. The title of the act provides no guidance at all, and Petitioners' reference to a discussion of other portions of HCQIA which they do not challenge here sheds no light on the "reasonable belief" standard.

Petitioners then cite the dissent in *Austin v. McNamara*, 979 F.2d at 741 n.3, the first appellate case announcing the objective reasonableness standard. Pet. at 19-20 n.11. No Circuit Court has ever followed the dissent in *Austin*. To the contrary, the Circuits Courts, separately and collectively, have

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[28] Petitioners' argument seems to use the word "more" as its primary lynchpin. Pet. at 18.

reached the same conclusion again and again: the "reasonable belief" requirement is an objective standard, not a subjective one. *See Singh*, 308 F.3d at 32; *Bryan*, 33 F.3d at 1323; *Sugarbaker*, 190 F.3d at 912; *Brown*, 101 F.3d at 1333; *Mathews*, 87 F.3d at 635; *Smith*, 31 F.3d at 1485. The Fifth Circuit's decision in this case simply reaches the inevitable result that Petitioners hoped to avoid.[29]

Petitioners then argue that the Fifth Circuit's faithful application of the objective "reasonable belief" standard is bad policy that results in three adverse consequences: according to Petitioners, this standard, consistently applied by all of the federal Circuit Courts that have addressed it, "[u]surps the fact-finding role of the jury[, . . .] [r]enders state peer review immunity statutes meaningless[, . . . and t]ransforms the qualified immunity intended by Congress into absolute immunity[.]" Pet. at i-ii. On pages 21-22 of their Petition, Petitioners raise a fourth alleged adverse consequence – that no evidence can be used to rebut the presumption of immunity. This simply duplicates Petitioners' complaint that the courts have transformed HCQIA immunity from a qualified immunity to an absolute immunity.

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[29] Petitioners offer no proof that Congress has disapproved of the federal courts' consistent interpretation of the "reasonable belief" standard in Sections 11112(a)(1) and (4) or has otherwise tried to amend the statute to "correct" the prevailing, unanimous construction of the statute.

Petitioners urge that the Court's application of an objective reasonableness standard wrongly usurps the jury's fact-finding role. Pet. 22-26. The same could be said of any case in which a trial or appellate court decides an issue as a matter of law. Petitioners' arguments prove too much and nothing at all. This argument reveals Petitioners' frustration with the Fifth Circuit's faithful application of existing law, but offers no viable reason to reverse the past decade and a half of uniform appellate court interpretations of HCQIA.[30] Moreover, this argument ignores the express intent of Congress that medical peer review cases almost always be decided as a matter of law. *See* H.R. Rep. No. 99-903, at 10 (1986), *as reprinted* in 1986 U.S.C.C.A.N. 6384, 6393.

Petitioners' claim that state peer review statutes have been rendered meaningless makes no sense. The state statutes complement HCQIA by providing different and independent grounds for immunity for peer reviewers: peer reviewers in Texas have immunity (1) under HCQIA when their actions are objectively reasonable and/or (2) under the Texas statute when they subjectively have no knowledge of the use of false information in the peer review process. *See* 42 U.S.C. § 11115(a) (expressly preserving other

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[30] AAPS's odd, related complaint that the Fifth Circuit substituted its "(untrained) medical judgment" for the at least equally untrained medical judgment of the jury ignores the standards under Federal Rule of Civil Procedure 50, which the Fifth Circuit painstakingly applied. AAPS Br. at 3.

immunities provided by law). Indeed, the trial court in this case found, as a matter of law, that the suspension of Dr. Poliner's cardiac catheterization and echocardiography privileges in June 1998 was immune under both HCQIA and the applicable Texas statute. *See* Pet. App. at 94a-110a; *see also Maewal v. Adventist Health Sys./Sunbelt, Inc.*, 868 S.W.2d 886 (Tex. App. – Fort Worth 1993, writ denied) (construing and harmonizing Texas peer review statute and HCQIA). In Texas, a number of cases have separately considered the applicability of the Texas statute. *See, e.g., St. Luke's Episcopal Hosp. v. Agbor*, 952 S.W.2d 503 (Tex. 1997) (holding that Texas statute provides hospitals with immunity from negligent credentialing claims); *Dallas County Med. Soc'y v. Ubiñas-Brache*, 68 S.W.3d 31, 39-40 (Tex. App. – Dallas 2001, pet. denied) (holding that plaintiff-physician waived his claims by failing to request a jury question on malice under the Texas peer review statute); *Roe v. Walls Reg'l Hosp.*, 21 S.W.3d 647, 653-54 (Tex. App. – Waco 2000, no pet.) (holding that hospital was immune for peer review actions under Texas statute as a matter of law). Petitioners' unsubstantiated claims of preemption are simply wrong.[31]

Finally, Petitioners warn that the immunity afforded by an objective "reasonable belief" test amounts to absolute immunity and betrays Congress's

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[31] Additionally, the Texas statute, when met, provides protection from all civil liability, not simply from liability for damages.

intent to create only a qualified immunity. Pet. 12-14, 15-17, 19-20, 30-32; *see also* AAPS Br. at 5. They also argue hyperbolically that the application of the objective reasonableness standard means that there exists no evidence that can rebut a presumption of immunity. Pet. 21.[32] Petitioners conveniently forget that a plaintiff need only rebut the presumption of immunity as to one of the four prongs of Section 11112(a) in order to defeat HCQIA immunity. Petitioners also conveniently ignore the handful of cases in which physician-plaintiffs have prevailed or defeated summary judgment. *See, e.g., Brown*, 101 F.3d at 1332-34; *Islami v. Covenant Med. Ctr., Inc.*, 822 F. Supp. 1361 (N.D. Iowa 1992); *see generally*, Scott M. Smith, Annotation, *Construction and Application of Health Care Quality Improvement Act of 1986*, 121 A.L.R. FED. 255 (1994 and Supp. 2004). These strawmen deserve no further discussion.[33]

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[32] While Petitioners disagree, the Fifth Circuit thoroughly explained why, under settled law, Petitioners' specific claims about alleged Medical Staff Bylaws violations were not relevant to the HCQIA immunity analysis. Pet. at 21-22; *see* Pet. App. at 27a-29a.

[33] Amici attempt to raise additional, unfounded arguments that Petitioners do not raise and have never raised. The Court should not consider any of these late arguments, and these arguments fail on their merits in any event. For example, AAPS argues cursorily that "'[r]easonable belief' must include a subjective element to avoid constitutional difficulties." AAPS Br. at 17. SSI argues first that the Courts of Appeals, in interpreting HCQIA, have somehow "displaced" HCQIA with federal common law and also that HCQIA must now be interpreted

(Continued on following page)

Contrary to Petitioners' claims, the Fifth Circuit faithfully carried out the precise policy balance Congress struck in passing HCQIA. Pet. App. at 16a-17a, 28a-29a.

As the Court wrote:

> To allow an attack years later upon the ultimate "truth" of judgments made by peer reviewers supported by objective evidence would drain all meaning from the statute. The congressional grant of immunity accepts that few physicians would be willing to serve on peer review committees under such a threat; as our sister circuit explains, "'the intent of [the HCQIA] was not to disturb, but to reinforce, the preexisting reluctance of courts to substitute their judgment on the merits for that of health care professionals and of the governing bodies of hospitals in an area within their expertise.'" At the least, it is not our role to re-weigh this judgment and balancing of interests by Congress.

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according to Joint Commission on Accreditation of Healthcare Organizations' ("JCAHO") standards. SSI's mangled, laborious efforts to manufacture a circuit split under the guise of federal common law fail – the cases in SSI's grab-bag either apply HCQIA's objective standards consistently to find immunity as a matter of law, discuss different state peer review immunity statutes that use subjective, not objective, standards, discuss immunity under medical staff bylaws provisions, or do not mention HCQIA at all. SSI gives no clue about how any JCAHO standards would make any difference in this case, even if they were applicable (which they are not).

Id. at 36a (footnote omitted – *quoting Lee v. Trinity Lutheran Hosp.*, 408 F.3d 1064, 1073 (8th Cir. 2005) (*quoting Bryan*, 33 F.3d at 1337)). Congress passed HCQIA to put an end to exactly the type of second-guessing of reasonable peer review decisions that Petitioners and AAPS urge here. *See, e.g.*, Pet. at 10-12; AAPS Br. at 11.

II. THE FIFTH CIRCUIT CORRECTLY APPLIED HCQIA IN REVERSING AND RENDERING JUDGMENT FOR RESPONDENTS.

The Fifth Circuit correctly applied the HCQIA immunity analysis, reversing the Amended Final Judgment and rendering judgment for Respondents. Reviewing the district court's denial of Respondents' motion for judgment as a matter of law *de novo* under the proper, well-established standard, Pet. App. at 16a-37a, the Fifth Circuit held that Respondents were "immune under HCQIA from money damages for the temporary restrictions of Poliner's privileges." Pet. App. at 3a.

Cognizant of the statutory presumption of immunity and the proper placement of the burden of proof, the Fifth Circuit first determined that, at the time of the professional review actions, the reviewers acted "in the reasonable belief that the action was in the furtherance of quality health care." 42 U.S.C. § 11112(a)(1). Citing opinions from many different circuits, the court concluded that, on May 14, and

again on May 27, given Petitioner's alarming treatment of Patient 36 and the string of other patient-safety concerns that had surfaced "in relatively quick succession," "there was ample basis for concern" to support the temporary restriction of Poliner's cardiac catheterization privileges. Pet. App. at 23a. "[A]s to both peer review actions, the belief that temporarily restricting Poliner's cath lab privileges during an investigation would further quality health care was objectively reasonable." *Id.* Based on well-settled law, the Court of Appeals properly rejected Poliner's arguments for hindsight or post-hoc analysis and for consideration of subjective motives. *Id.* at 23a-25a; *see supra* at 16-27.

The Court of Appeals next held that no reasonable jury could have determined that Respondents failed to make "a reasonable effort to obtain the facts." 42 U.S.C. § 11112(a)(2). As to the May 14 abeyance, a review of the care that Poliner provided to Patients 3, 9, and 18 had been conducted, as had an initial review of Patient 36's films and chart. Pet. App. at 26a. As to the second abeyance, the 44 cases reviewed by the ad hoc committee constituted a reasonable investigation. Pet. App. at 26a-27a.[34]

Next, the Fifth Circuit held that the two abeyances complied with any required notice and hearing

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[34] Petitioners do not challenge the Fifth Circuit's holding that Respondents conducted a reasonable effort to obtain the facts under Section 11112(a)(2) as a matter of law.

procedures under Section 11112(a)(3), together with Section 11112(c). Section 11112(c) modifies HCQIA's notice and hearing requirements for restrictions of clinical privileges that are imposed for no longer than 14 days while a peer review investigation is being conducted, 42 U.S.C. § 11112(c)(1)(B), and for restrictions imposed when there may be "an imminent danger to the health of any individual." 42 U.S.C. § 11112(c)(2); *see* Pet. App. at 30a. The Court concluded that the May 14 abeyance fell squarely within Section 11112(c)(1)(B) and that the extension of the abeyance fell squarely within Section 11112(c)(2). Pet. App. at 30a-31a. The gravity of Poliner's diagnostic error with Patient 36, the substandard care found to have been given in more than half of the cases reviewed, and the serious risks accompanying cardiac catheterizations supported the conclusion that Respondents' failure to extend the restrictions on Poliner's privileges "may [have] result[ed] in an imminent danger to the health of any individual." 42 U.S.C. § 11112(c)(2). Furthermore, and in the alternative, the court concluded that "Poliner received 'fair' procedures" under the circumstances in connection with the second abeyance. 42 U.S.C. § 11112(a)(3); *see* Pet. App. at 33a-34a.[35]

Finally, undertaking its objective analysis for Section 11112(a)(4) – whether each of the peer review

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[35] Again, Petitioners do not challenge the Fifth Circuit's holdings with respect to Sections 11112(a)(3) and 11112(c).

actions was taken "in the reasonable belief that the action was warranted by the facts known after such reasonable effort to obtain facts" – the Court determined that the temporary restrictions were warranted. Pet. App. at 35a-36a.

In sum, the Court correctly held:

> Not only has Poliner failed to rebut the statutory presumption that the peer review actions were taken in compliance with the statutory standards, the evidence independently demonstrates that the peer review actions met the statutory requirements.

Id. at 36a-37a.

III. ADDITIONAL, DISPOSITIVE LEGAL ISSUES, RECOGNIZED BUT NOT DECIDED BY THE FIFTH CIRCUIT, ALSO MAKE THIS AN INAPPROPRIATE CASE FOR THIS COURT TO REVIEW.

Though HCQIA immunity provided the sole basis for the Court of Appeals' reversal and rendition of judgment for Respondents, the Court recognized the existence of additional, dispositive legal issues that would require rendition of judgment for Respondents or, at a minimum, a new trial. Pet. App. at 37a.

Respondents will not detail or brief all of these additional arguments here, but simply indicate that their "other substantial arguments" include immunity under the Texas Medical Peer Review statute,

Poliner's agreement to both abeyances, and other rendition points relating to all of Petitioners' state law claims. *Id.*[36] Respondents reserve the right to brief these points more fully, if necessary.

These other dispositive issues make this case a particularly poor vehicle for resolving the issue raised by Petitioners. For this additional reason, this Court should decline to review this case.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Counsel of Record

December 12, 2008

[36] Respondents' separate new trial points include complaints about the sheer size of the verdict, repeated, improper argument appealing to passion and prejudice, and the erroneous admission and exclusion of critical evidence.

APPENDIX A

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LAWRENCE R. POLINER, M.D., and LAWRENCE R. POLINER, M.D., P.A.,	§	
Plaintiffs,	§	
v.	§	
TEXAS HEALTH SYSTEMS, A TEXAS NON-PROFIT CORPORATION d/b/a PRESBYTERIAN HOSPITAL OF DALLAS; JAMES KNOCHEL, M.D.; CHARLES LEVIN, M.D.; and JOHN HARPER, M.D.,	§	**NO. 3:00-CV-1007-P**
Defendants.	§	

AMENDED FINAL JUDGMENT

(Entered Nov. 20, 2006)

Pursuant to the Court's Memorandum Opinion and Orders of September 30, 2003, July 7, 2004, March 27, 2006, October 12, 2006, and November 17, 2006 and the jury verdict returned on August 27, 2004, the Court issues this Amended Final Judgment as follows:

1. Plaintiff Lawrence R. Poliner, M.D. ("Plaintiff") is awarded $22,500,000 on his defamation claim against Defendants Texas Health Systems d/b/a Presbyterian Hospital of

Dallas ("Presbyterian Hospital of Dallas") and Dr. James Knochel, M.D. ("Dr. Knochel").

2. Judgment is entered against Dr. Knochel as follows:

   a) $6 million for injury to Dr. Poliner's career;

   b) $6 million for Dr. Poliner's mental anguish; and

   c) $750,000 for punitive damages.

3. Judgment is entered against Presbyterian Hospital of Dallas as follows:

   a) $4.5 million for injury to Dr. Poliner's career;

   b) $4.5 million for Dr. Poliner's mental anguish;

   c) $750,000 for punitive damages.

4. Plaintiffs Lawrence R. Poliner, M.D. and Lawrence R. Poliner, P.A. (collectively, "Plaintiffs") take nothing from any Defendants based on Plaintiffs' antitrust claims.

5. Plaintiffs takes nothing from any Defendants based on Plaintiffs' Deceptive Trade Practices Act claims.

6. Plaintiffs take nothing from any Defendants based on Dr. Poliner's June 12, 1998 suspension.

7. Plaintiffs take nothing from any of their claims against defendants Charles Harris, M.D., Anthony Das, M.D., David Musselman,

M.D., Robert Brockie, M.D., Jorge Cherif, M.D., Steven Meyer, M.D., and Martin Berk, M.D.

8. Costs are assessed against Plaintiffs insofar as those costs were incurred defending those Defendants listed in Paragraph 7.

9. Costs are assessed against Defendants James Knochel, M.D. and Presbyterian Hospital of Dallas insofar as those costs were incurred prosecuting Plaintiffs' claims against said Defendants.

10. Prejudgment interest shall be awarded at the rate of 8.25% beginning from the date suit was filed through the date of judgment, October 13, 2006, applicable only to the amount of compensatory damages awarded.

11. Postjudgment interest shall be awarded at the rate of 4.90% beginning from the day after the date of judgment, October 14, 2006, until the judgment is satisfied.

IT IS SO ORDERED.

Signed this 17th day of November 2006.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES
DISTRICT JUDGE

APPENDIX B

IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF TEXAS
DALLAS DIVISION

LAWRENCE R. POLINER, M.D., and LAWRENCE R. POLINER, M.D., P.A.,	§	
Plaintiffs,	§	
v.	§	CIVIL ACTION NO. 3:00-CV-1007-P
TEXAS HEALTH SYSTEMS, A TEXAS NON-PROFIT CORPORATION d/b/a PRESBYTERIAN HOSPITAL OF DALLAS; JAMES KNOCHEL, M.D.; CHARLES LEVIN, M.D.; and JOHN HARPER, M.D.,	§	
Defendants.	§	

MEMORANDUM OPINION AND ORDER

(Filed Nov. 17, 2006)

Now before the Court are the following motions filed by Defendants on October 27, 2006:

(1) Second Renewed Motion for Judgment as a Matter of Law;

(2) Second Motion for New Trial;

(3) Second Motion for Remittitur; and

(4) Motion to Alter or Amend Final Judgment.

After careful consideration of the briefing, the evidence, and the applicable law, the Court hereby DENIES Defendants' Second Renewed Motion for Judgment as a Matter of Law; DENIES Defendants' Second Motion for New Trial; DENIES Defendants' Second Motion for Remittitur; and GRANTS in PART and DENIES in PART Defendants' Motion to Alter or Amend Final Judgment.

SECOND RENEWED MOTION FOR JUDGMENT AS A MATTER OF LAW

Defendants filed a Rule 50(b) Renewed Motion for Judgment as a Matter of Law on October 3, 2005 following a jury verdict in this case. They now file a second Renewed Motion for Judgment as a Matter of Law. Because this Court already ruled on Defendants' post-verdict Rule 50(b) motion in its March 27, 2006 order, this motion is hereby DENIED as duplicative.

This motion is also DENIED on its merits. Defendants argue that the Court erred in ruling that Defendants waived their argument that Dr. Poliner's defamation claim was barred by limitations. Defendants argue, as they did in their original Rule 50(b) motion, that all statements relied on by Plaintiffs were made more than one year before this suit was filed. They also re-argue that any statements that do fall within the limitations period are nonactionable because they refer to the immune June 1998 summary suspension. Defendants argue for two pages that they raised their Rule 8(c) affirmative defense of

statute of limitations at the pleading stage, at summary judgment, and at other various junctures throughout the case.

All of these arguments were raised and considered at length by the Court in the Rule 50(b) briefing and opinion. The Court acknowledged in its March 27, 2006 opinion that Defendants raised a Rule 8(c) affirmative defense of statute of limitations at the pleading and summary judgment stages. Apparently, Defendants do not understand the remainder of the Court's ruling. Again, the only bases Plaintiff had for defeating Defendants' statute of limitations argument were the two republications identified in the Court's order (*i.e.*, the December 14, 1999 Verification of Privileges letter and the January 5, 2000 credentialing application). The Court does not accept Defendants' contention that "the facts underlying the limitations defense were undisputed [and] did not require or warrant the submission of a separate jury question." (Mot. at 6 n.1.) The Court found at the summary judgment stage that these two republications were sufficient to raise a fact issue as to whether a defamatory republication was made within one year of filing suit. Defendants waived their statute of limitations defense with regard to those documents because they never argued at any time prior to their Rule 50(b) motion that those republication documents were insufficient to prove that a

defamatory publication was made.[1] In sum, Defendants have not provided any legal basis or authority to cause the Court to reverse its earlier ruling. All of these arguments were reviewed and resolved in the Court's March 27, 2006 order denying Defendants' Renewed Motion for Judgment as a Matter of Law and therefore, Defendants' motion is hereby DENIED.

SECOND MOTION FOR A NEW TRIAL

Defendants argue that they are entitled to a new trial under Rule 59 because the jury was motivated by passion and prejudice. Because this Court already ruled on Defendants' motion for a new trial, which involved analysis of this particular issue, this motion is hereby DENIED as duplicative.

This motion is also DENIED on its merits. Defendants argue that the Court's October 13, 2006 order was "internally contradictory" because the "verdict cannot simultaneously be 'not reasonable' and 'not a rational amount' on the one hand, and yet be 'a product of reason' and 'resulting from a rational deduction,' on the other hand." (Mot. at 3.) Again, Defendants appear to have misunderstood the Court's ruling. The Court expressly stated that the verdict

[1] Now, in addition to arguing that those republications referenced the summary suspension, not the abeyance, they argue the republications are nonactionable based on truth. For the same reasons, that argument has been waived.

amount was not rational, but the jury's desire to punish Defendants was. There is no contradiction in these statements and the Court stands by its earlier ruling.

Defendants also argue that the verdict amount was improperly based on damages evidence resulting from the June suspension. However, the jury was explicitly and properly instructed that it may only "consider damages, if any, that resulted from the actions of Defendants occurring on or before May 14, 1998 and/or May 29, 1998." The jury was instructed not to "consider damages that stem from any action taken on or after June 12, 1998." The Court presumes that the jury followed the instructions. As stated in the Court's October 13, 2006 order, the jury could have reasonably found that the evidence at trial established Dr. Poliner suffered economic damage and mental anguish as a result of being labeled a dangerous doctor. (Order at 10-11.)

In sum, Defendants have not provided any legal basis or authority to cause the Court to reverse its earlier ruling. All of these arguments were reviewed and resolved in the Court's October 13, 2006 order denying Defendants' first Motion for a New Trial and therefore, Defendants' second motion is hereby DENIED.

SECOND MOTION FOR REMITTITUR

Defendants file this Second Motion for Remittitur without providing any procedural basis therefore.

Because this Court already ruled on Defendants' original motion for remittitur, this motion is hereby DENIED as duplicative.

This motion is also DENIED on its merits. Defendants have not provided any basis under Rule 60 to warrant the Court granting relief from its order. First, Defendants argue the Court lacked any justifiable basis for declining application of the Maximum Recovery Rule. Defendants challenge the Court's determination that this case involved unique facts and circumstances that were not present in the controlling case law. Defendants vigorously argue that the Court was wrong in declining to find that this case and *Rea* are "fundamentally similar." This Court presided over *Rea* and has spent six years presiding over this case. The Court stands by its ruling.

Defendants' disagreement with the Court's analysis or conclusion does not entitle them to simply re-urge earlier arguments. Defendants have not provided any new legal authority or factual basis to warrant reversal of the Court's earlier ruling.

Defendants also argue that the Court's remitted award of compensatory and punitive damages remains excessive and that further remittitur is required. Defendants contend that the $21 million award has no basis in the evidence relating only to the abeyance. In its October 13, 2006 opinion, the Court discussed the evidence it relied on at length. (*See* Order at 9-12.) Moreover, as stated *supra*, there

was evidence at trial establishing that Dr. Poliner suffered economic damage and mental anguish as a result of being labeled a dangerous doctor.[2]

Defendants also argue that the jury verdict awarded a double recovery because "[t]here is no reason to believe the jury followed the" instructions to award damages as to each individual defendant with regard to non-economic damages. (Mot. at 6 n.3.) The Court disagrees. The jury awarded a different amount next to each defendant's name, thereby giving reason to believe that the jury found different defendants liable for different amounts of Plaintiff's damages.

In sum, Defendants have not provided any legal basis or authority to cause the Court to reverse its earlier ruling. All of these arguments were reviewed and resolved in the Court's October 13, 2006 order entering a remittitur and therefore, Defendants' motion is hereby DENIED.

MOTION TO ALTER OR AMEND FINAL JUDGMENT

First, Defendants argue that Plaintiff Lawrence R. Poliner, P.A. is not entitled to recover judgment on

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[2] The Court will not engage in a discussion about whether Dr. Poliner's injuries were more or less horrific or painful than other injuries suffered by other victims in other cases unrelated to this one. The Maximum Recovery Rule applies to "factually similar cases" in the relevant jurisdiction.

a defamation claim it never brought. The Court agrees. The Final Judgment will be amended to reflect same. Likewise, the Court agrees that Plaintiff Lawrence R. Poliner, M.D. is not entitled to recover economic damages because all evidence of economic damages was suffered by the P.A. The Final Judgment will be amended to reflect same. Additionally, the Court will amend its Final Judgment to limit prejudgment interest to the amount of compensatory damages awarded.

The Court disagrees with Defendants' argument that the jury awarded double or overlapping recoveries. The jury was instructed to assess damages separately for each defendant. Additionally, as stated in the Court's October 13, 2006 order, the jury's finding of liability against the Hospital was appropriate in light of the testimony and conduct of the Hospital's Vice-President and President. That verdict does not overlap with its verdict against Dr. Knochel. Defendants' motion is denied on this basis.

With respect to Drs. Levin and Harper, the Court finds that because their settlement does not involve any appealable issue(s) and because Plaintiffs' claims against them were resolved by settlement and Order dated December 8, 2004, inclusion in the Final Judgment is neither necessary nor appropriate.

Therefore, Defendants' Motion to Alter or Amend Final Judgment is hereby GRANTED in part and DENIED in Part.

IT IS SO ORDERED.

Signed this 17th day of November 2006.

/s/ Jorge A. Solis
JORGE A. SOLIS
UNITED STATES
DISTRICT JUDGE